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No. 06-563

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# In the Supreme Court of the United States

JOHN BRIGHT, Individually and in his capacity as Administrator of the Estate of Annette Bright, deceased,
*Petitioner*,

v.

WESTMORELAND COUNTY, et al.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION

THOMAS P. PELLIS, ESQUIRE
*Counsel of Record*
MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
114 SOUTH MAIN STREET
GREENSBURG, PA 15601
(724) 836-4840
*Counsel for Respondents, Westmoreland County; Tami Whalen, individually and in her capacity as a Probation Officer for Westmoreland County; Richard Yesko, individually and in his capacity as Probation Officer for Westmoreland County; Anthony C. Giunta, individually and in his capacity as Probation Supervisor for Westmoreland County; and John Peck, individually and in his capacity as District Attorney of Westmoreland County*

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Whether the Third Circuit Court of Appeals appropriately applied the stated rule of law upon which Petitioner's claims are based, and therefore, no compelling reasons exist for this Petition to be granted?

II. Whether the Petition for a Writ of Certiorari should be denied where the Third Circuit Court of Appeals affirmed the dismissal of Petitioner's First Amended Complaint, which fails to meet any of the requirements of the state-created danger exception and seeks to rewrite the Fourteenth Amendment through a tortured application of consistent precedent?

III. Whether the Petition for a Writ of Certiorari relative to the Third Circuit Court of Appeals' dismissal of the Petitioner's state law claims must be denied where no compelling reasons exist for this Court's consideration?

## PARTIES TO THE PROCEEDING

The Petitioner is JOHN BRIGHT, individually and in his capacity as Administrator of the Estate of Annette Bright, deceased.

The Respondents are WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as Probation Officer for Westmoreland County; ANTHONY C. GIUNTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSON; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monesson; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK.

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## INTRODUCTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *See* United States Supreme Court Rule 10. A petition for a writ of certiorari will be granted only for compelling reasons. Id. Petitioner fails to offer any compelling reason why this Court should grant this petition.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Id. At bottom, Petitioner seeks review in this Court of factual issues which Petitioner contends satisfy requirements of the state-created danger theory of liability. Petitioner fails to offer any compelling reason why the Court should grant review in this case.

In light of the aforementioned, and as more fully set forth below, the Court should deny Petitioner's Petition for a Writ of Certiorari in its entirety.

## ARGUMENT

### I. THE THIRD CIRCUIT COURT OF APPEALS APPROPRIATELY APPLIED THE STATED RULE OF LAW UPON WHICH PETITIONER'S CLAIMS ARE BASED, AND THEREFORE, NO COMPELLING REASONS EXIST FOR THIS PETITION TO BE GRANTED.

Petitioner's Petition for a Writ of Certiorari fails to assert any compelling reasons for this Court to exercise its discretionary jurisdiction over this matter. United States Supreme Court Rule 10 provides guidance as to the character of the reasons the Court considers, stating, in relevant part,

that the following are indicative of matters which may warrant review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ...
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Supreme Court Rule 10.

Petitioner's request for a Writ of Certiorari does not satisfy any of the examples given in Rule 10, nor does it proffer any other legitimate issues requiring this Court's discretionary jurisdiction.

The Third Circuit Court of Appeals has properly stated and applied the precedent established by this Court in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). In that case, this Honorable Court settled the narrow grounds upon which the state may be liable to individuals under the substantive component of the Fourteenth Amendment's Due Process Clause. Nothing contained in the Third Circuit's application of this precedent, nor any other

circuit's application of it, has conflicted with the general premise that the substantive Due Process Clause of the Fourteenth Amendment is clearly and unequivocally designed to protect individuals from improper government action, but does not guarantee those same individuals protection against private acts of violence. In fact, the Third Circuit's opinion cites DeShaney throughout, and while addressing other similar cases within the circuit, the Court of Appeals observed as follows:

> Our case law establishes the following essential elements of a meritorious "state-created danger" claim:
>
> (1) "the harm ultimately caused was foreseeable and fairly direct;"
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

(Pet. Apx. 12A)(footnotes omitted). See also, Townsley v. West Brandywine Tp., 2006 WL 1147267, at *6 (E.D.Pa. Apr. 26, 2006).

It is important to note that the Third Circuit's opinion in this matter specifically addressed the claim by Petitioner on reconsideration via identical issues argued in this Petition, and held that any perceived inconsistencies within its decisions were controlled by the teachings of DeShaney. In this regard, the Third Circuit Court declared:

> While acknowledging that the line between action and inaction is sometimes difficult to draw, we there affirmed what DeShaney clearly teaches: the Due Process Clause proscribes only state action and, accordingly, liability "under the state-created danger theory [can only] be predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger."

(Pet. Apx. 14A)(citing D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1374 (3d Cir. 1992)(en banc), cert. denied, 506 U.S. 1079 (1993)).

The Third Circuit further acknowledged that it *never* found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised. It continued:

> Contrary to Bright's suggestion, Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), and Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997), do not indicate otherwise. In Kneipp, the police stopped a couple on the street in the middle of the night for causing a disturbance. The wife was intoxicated to the

> point of being unable to walk without assistance. While the police initially detained both of them, they subsequently gave the husband permission to go home. He departed, assuming that the police were going to take her either to the hospital or the police station. At some point after his departure, the police sent the wife home alone, resulting in her fall to the bottom of an embankment and serious injury. We affirmed, finding that there was "sufficient evidence in the summary judgment record to show that ... the police officers used their authority as police officers to create a dangerous situation or to make [the wife] more vulnerable to danger [than] had they not intervened. ... As a result of the affirmative acts of the police officers, the danger or risk of injury to [the wife] was greatly increased. Kneipp, 95 F.3d at 1209.
>
> In Morse, we characterized the issue raised under the fourth element of a state-created danger claim as whether "the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.'" Morse, 132 F.2d at 915 (quoting from Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)). We affirmed the District Court's dismissal of the complaint, however, based on plaintiff's failure to satisfy the first element of a state-created danger claim, *i.e.*, on the facts alleged, the third parties' "deadly attack was not a foreseeable and fairly direct result of defendants' behavior." Id. at 915-16.

(Pet. Apx. 15A-16A).

The court appropriately closed its discussion by stating the following:

> We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

(Pet. Apx. 18A). This application of law and inevitable conclusion are not only consistent with the mandate of this Honorable Court, but also with the other circuits, and no adequate grounds exist for this Court to accept certiorari.

**II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WHERE THE THIRD CIRCUIT COURT OF APPEALS AFFIRMED THE DISMISSAL OF PETITIONER'S FIRST AMENDED COMPLAINT, WHICH FAILS TO MEET ANY OF THE REQUIREMENTS OF THE STATE-CREATED DANGER EXCEPTION AND SEEKS TO REWRITE THE FOURTEENTH AMENDMENT THROUGH A TORTURED APPLICATION OF CONSISTENT PRECEDENT.**

Dissatisfied with the Third Circuit Court of Appeals' decision affirming the dismissal of his First Amended Complaint, and in a transparent effort to obtain a more favorable result in his own case, Petitioner apparently seeks to persuade this Honorable Court that its prior holding in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), was ambiguous and/or is being inconsistently applied by the Third Circuit. In fact, Petitioner promotes a more expansive view of the protections afforded by the substantive component of the Due Process Clause by fashioning what he describes as an "emboldenment" theory,

while citing no legitimate precedent to support his request. Certainly, no precedent from the Third Circuit Court - which has consistently applied DeShaney - merits review. Petitioner's efforts are misguided, misplaced, and his Petition should be denied.

The decision of the Third Circuit Court of Appeals was entirely consistent with the rule of law articulated by this Court in DeShaney; specifically, that a state actor's mere awareness of a danger, even when coupled with "expressions of intent to help" the ultimate victim, does not give rise to an affirmative duty to protect under the Due Process Clause. Id. at 189-90, 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf"). Indeed, Petitioner's allegations against the Westmoreland County Respondents, while strikingly similar to those made by the plaintiff in DeShaney, are even more tenuous.

In DeShaney, the plaintiff brought a civil rights action against social workers and local officials who had received complaints that her child was being abused by his father, but failed to permanently remove the child from his father's custody. Id. at 191-92. The Complaint alleged that the child was deprived of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, because the State actors failed to intervene to protect the child against a risk of violence at his father's hands of which they knew or should have known. Id. at 193. The father eventually beat the boy so severely that he suffered brain damage and was expected to spend the remainder of his life confined to an institution for the profoundly retarded. Id. at 193. Thus, in DeShaney, the state actors were not only aware

of the specific type of danger presented - physical harm - but also of the specific victim, Joshua DeShaney. Still, there was no affirmative constitutional duty to protect. See also, Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir. 1995)("The cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury"), cert. denied, 516 U.S. 858 (1995).

Even under the most stringent standards of a Rule 12(b)(6) Motion to Dismiss, Petitioner's First Amended Complaint against the Westmoreland County Respondents, individually and collectively, fails to allege a substantive Due Process claim. There are no allegations in Petitioner's First Amended Complaint which would establish that the Westmoreland County Respondents "created" a danger which did not otherwise exist. DeShaney, 489 U.S. at 201. There are also no allegations that the County had any knowledge of a specific danger to Annette Bright at the hands of Charles Koschalk, nor could there be. Koschalk's prior conviction was for corrupting the morals of a minor, not Annette Bright, and there was never a suggestion that his behavior could turn violent. Moreover, at the time of her murder, Annette Bright was in the custody of her parents. It cannot be inferred merely from the County's knowledge of Koschalk's probation violation - which involved another minor (decedent's sister) - that the County was or could have been aware of any danger posed to Annette.[1] As further noted by the Honorable United States District Judge Arthur J. Schwab, to conclude that the

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[1] There are also no allegations that the County was aware of the alleged letter to the victim's sister in which Koschalk allegedly expressed his criminal intent. (Pet. 20).

Respondents' failure to arrest and/or incarcerate Koschalk "emboldened" him to commit murder would require a mind-reading inference which is simply unreasonable. (Pet. Apx. 55A).

Even allowing this factual liberty by Petitioner, it is of no advent in these proceedings. Since even an awareness of danger to a particular victim imposes no constitutional duty to protect, Respondents' lack of awareness of any potential for harm to Annette Bright removes this case even further from the ambit of protections afforded by the Due Process Clause. The Third Circuit appropriately held: "A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff." (Pet. Apx. 16A). See also, DeShaney, 489 U.S. at 200 ("In the substantive due process analysis, it is the State's *affirmative act* of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the Due Process Clause, *not its failure to act to protect his liberty interests against harms inflicted by other means*")(emphasis added).

In essence, Petitioner alleges that had the Westmoreland County Respondents more quickly processed Koschalk's parole revocation, he would not have had the opportunity to commit the heinous crime upon the minor child, Annette Bright. (Pet. Apx. 68A, ¶ 25; 72A, ¶¶ 30.h.-31). While in hindsight the crime may have been averted had Koschalk been incarcerated instead of at large, this alone does not give rise to a constitutional violation. Importantly, as this Court previously instructed: "[N]othing in the language of the Due

Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," since the purpose of the Clause is to "protect people from the State, not to ensure that the State protected them from each other." Id. at 195-96. The Third Circuit likewise recognized: "It is *misuse* of state authority, rather than a *failure* to use it, that can violate the Due Process Clause." (Pet. Apx. 13A)(emphasis added). Townsley, 2006 WL 1147267, at *7. By arguing to the contrary, Petitioner seeks to dismantle the clear and unambiguous precedent set forth by this Court in DeShaney and uniformly followed by the Third Circuit, namely, that "the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." DeShaney, 489 U.S. at 196-97.

Petitioner's brief is a tortured analysis of occurrences which do not under any reasonable interpretation untangle to fit within the parameters of an idea which was first outlined by this Court in dicta in DeShaney, 489 U.S. at 201, and was subsequently coined by DeShaney's progeny as the "state-created danger" theory. (Pet. Apx. 11A-13A). Moreover, since the granting of certiorari would not affect the ultimate finding that no constitutional violations occurred in this case, any decision rendered by this Court would be moot.

It is also relevant to note that Judge D. Brooks Smith of the Third Circuit Court indicated that the dismissal of Petitioner's First Amended Complaint was proper based not only upon the fourth prong of the state-created danger test, but also due to Bright's failure to plead facts sufficient to satisfy the first prong. (Pet. Apx. 17A, n. 8). In his view, the harm ultimately caused was not a "foreseeable and a fairly direct result of the state's actions." (Pet. Apx. 17A, n. 8). Consistent with the Westmoreland County Respondents' Brief in Support of Motion to Dismiss, Judge Smith agreed that the

crime of corrupting the morals of a minor is different in degree and kind from the crime of murder, and that, without more, a state actor could not foresee that "failing to detain a pedophile will result in homicide." (Pet. Apx. 17A, n. 8).

The foreseeability issue becomes even more diluted when consideration is given to the fact that the victim, Annette Bright, was not the child with whom the criminal actor (Koschalk) was involved. It is uncontested that the Westmoreland County Respondents never had any contact of any kind involving Annette Bright. Petitioner's claim that the crime against Annette Bright, committed some ten weeks after Koschalk was observed in public with another minor, somehow creates facts requiring an expansion of the state-created danger exception is, in a word, incomprehensible. In each case in which a state-created danger was alleged, including those cited by Petitioner, a fairly immediate, prompt, and foreseeable outcome to a discrete victim occurred as a result of the state actor's conduct. Here, however, the criminal act was too remote a consequence from the initial encounter, and the causal connection too attenuated to impose liability. See DeShaney, 489 U.S. at 197, n. 4 (citing Martinez v. State of Cal., 444 U.S. 277, 285 (1980), reh'g denied, 445 U.S. 920 (1980)). Contrary to Petitioner's assertions, and even assuming, arguendo, that an affirmative act existed, the lapse of over ten weeks time only suggests that the state's conduct did *not* place the victim in any worse condition, and in any event, clearly the conduct, taken as a whole, was not so culpable as to "shock the conscience." (Pet. Apx. 12A). See, Townsley, 2006 WL 114267, at *7, n. 5.

Both the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit were entirely correct in their

application of precedent to the facts of this case. The Third Circuit Court appropriately and concisely addressed the facts presented, holding:

> We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

(Pet. Apx. 18A).

Petitioner's argument essentially asks this Honorable Court to ignore the clear language of DeShaney and to rewrite the substantive Due Process Clause of the Fourteenth Amendment by forcing the State to act when its underlying tenet is to serve as a limitation on the State's power to act. DeShaney, 489 U.S. at 195. With respect to Petitioner's "emboldenment" theory, the courts below correctly declined to accept this novel theory, finding it would be an improper and unnecessary expansion of this Court's stated rule of law in DeShaney. As the Honorable Judge Schwab aptly stated:

> Nothing that the moving defendants did or did not do placed Annette Bright in **more** danger than she would have faced had the defendants never been involved with Koschalk's probation violations. Annette Bright had no constitutional right to be protected from the criminal acts of third persons and, therefore, was not deprived of a constitutional right by any of the moving defendants. See DeShaney, 489 U.S. 189, 109 S.Ct. 998 (1989).

(Pet. Apx. 58A)(emphasis in original).

Were this Court to accept Petitioner's argument, the State would necessarily become a permanent guarantor of the safety of all persons so long as some thread exists to connect a class of potential victims to the State. This was not the intention of the Due Process Clause, which this Court made abundantly clear in its DeShaney opinion. Moreover, this Court has often noted its "continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law,'" Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 125 S.Ct. 2796, 2810 (2005)(citing Parratt v. Taylor, 451 U.S. 527, 544 (1981)(quoting Paul v. Davis, 424 U.S. 693, 701 (1976), reh'g denied, 425 U.S. 985 (1976)), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986)), on remand, 144 Fed.Appx. 746 (10th Cir. 2005), reminding civil rights plaintiffs that "not 'all common-law duties owed by government actors were ... constitutionalized by the Fourteenth Amendment.'" DeShaney, 489 U.S. at 202 (quoting Daniels, 474 U.S. at 335). Accordingly, no compelling reasons exist for this Court to review or reiterate its well-reasoned and well-stated principles.

Finally, while making no representations regarding the merits of Petitioner's claims against the other Respondents, it is respectfully suggested that this Court distinguish between the facts allegedly known by and representations of the Respondents, City of Monesson and Officer Carl Franzaglio, as there are no allegations that any of the Westmoreland County Respondents knew of Petitioner's purported belief that his family was in danger, that he sought police aid, or that any representations were made with respect to the protection of his family or the arrest of Koschalk. Since there are no allegations that the Westmoreland County Respondents were

aware that this occurred, such acts cannot be imputed to them for purposes of constitutional liability.

## III. THE PETITION FOR A WRIT OF CERTIORARI RELATIVE TO THE THIRD CIRCUIT COURT OF APPEALS' DISMISSAL OF THE PETITIONER'S STATE LAW CLAIMS MUST BE DENIED WHERE NO COMPELLING REASONS EXIST FOR THIS COURT'S CONSIDERATION.

The District Court was entirely correct in dismissing plaintiff's state law claims against the Westmoreland County defendants and the Third Circuit Court appropriately applied established precedent supporting this dismissal. The Pennsylvania Political Subdivision Tort Claims Act grants immunity for government actors for negligent conduct with few exceptions. 42 PA. CONS. STAT. § 8545 (2006). Negligence in revoking probation is not one of the exceptions. After completing that analysis, the court appropriately reviewed the willful misconduct language contained in the statute. 42 PA. CONS. STAT. § 8550 (2006). Recognizing that willful misconduct in both the Pennsylvania and Federal courts is analogous to an intentional tort and requires that the actor desired to bring about the result, the lower courts appropriately dismissed the Petitioner's amended pleading, finding the allegations insufficient to establish willful misconduct. The Third Circuit Court stated:

> Bright does not allege that the individual state defendants desired to bring about harm to Annette Bright (or to her sister) or that they were aware that such harm "was substantially certain to follow." Rather, Bright alleges in his complaint that they acted with "deliberate indifference." App. at 58-a, and

> argues in his brief that they "knowingly and deliberately disregarded a known risk." Br. Appellant at 26. Assuming *arguendo* that a reasonable jury could infer such culpability from the facts alleged, the individual state-actor defendants would still not having engaged in "willful" misconduct and would still be entitled to immunity.

(Pet. Apx. 26A).

The lower courts appropriately addressed the state law claims and no compelling reason whatsoever exists for the Petitioner to raise this issue before this Honorable Court on request for certiorari. In fact, both the District Court and the Third Circuit appropriately cited and relied upon precedent from this Honorable Court by addressing the immunity issues "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." Saucier v. Katz, 533 U.S. 194, 200 (2001), on remand, 262 F.3d 897 (9th Cir. 2001). Accordingly, certiorari must be denied.

## CONCLUSION

This Honorable Court granted certiorari in DeShaney for the sole purpose of addressing the issue of when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's rights under the Due Process Clause of the Fourteenth Amendment. Id. at 194. After careful consideration of the text, meaning, and intent of the Due Process Clause, and acknowledging that one's sympathies may desire a different result when tragedy ensues, this Court declined to expand the scope of the Due Process Clause to require State actors to protect individuals against private acts of violence. Id. at 197, 203. Here, the United

States Court of Appeals for the Third Circuit faced an equally tragic set of circumstances involving the heartless murder of a minor child. Despite this daunting task, the Third Circuit followed this Court's direction in DeShaney and held that no constitutional violations were, or could be, alleged by the Petitioner herein. Contrary to Petitioner's assertions, the factual circumstances presented here do not warrant an expansion of the Due Process Clause, nor do any compelling reasons exist for this Court to reiterate its well-established precedent, which has been uniformly followed by the circuit courts. Accordingly, the Respondents respectfully submit that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

**MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.**

By: **THOMAS P. PELLIS, ESQUIRE**
*Counsel of Record* for Respondents, Westmoreland County; Tami Whalen, individually and in her capacity as a Probation Officer for Westmoreland County; Richard Yesko, individually and in his capacity as Probation Officer for Westmoreland County; Anthony C. Giunta, individually and in his capacity as Probation Supervisor for Westmoreland County; and John Peck individually and in his capacity as District Attorney of Westmoreland County

114 South Main Street
Greensburg, PA 15601
(724) 836-4840